Supreme Court, U.S.
FILED
APR 27 1993
OFFICE OF THE CLERK

No. 92-1689

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

SCOTT J. RAFFERTY,

Petitioner,

v.

ALBERT HALPRIN, GERALD MURRAY, ROBERT ECKENRODE, GAD SELIG, BARBARA LENT, NYNEX INFORMATION SOLUTIONS GROUP, and NEW YORK TELEPHONE COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

GUY MILLER STRUVE
Counsel of Record
JAMES D. LISS
SETH RICHARD LESSER
DAVIS POLK & WARDWELL
450 Lexington Avenue
New York, N.Y. 10017
(212) 450-4192

Counsel for Respondents Gerald E. Murray, Robert J. Eckenrode, Barbara A. Morris-Lent, NYNEX Information Solutions Group, and New York Telephone Company

STEPHEN L. GOODMAN
HALPRIN, TEMPLE & GOODMAN
1301 K Street, N.W.
Suite 1020 East
Washington, D.C. 20005
(202) 371-9100

Counsel for Respondent Albert Halprin

REID H. WEINGARTEN
STEVEN K. DAVIDSON
STEPTOE & JOHNSON
1300 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 429-3000

Counsel for Respondent Gad Selig

Questions Presented

1. When one case filed in a federal district court is stayed pending resolution of a case previously filed in another federal district court between the same plaintiff and privies of the defendants, is that stay appealable either as a final order or under the collateral order doctrine?

2. Is an order of a court of appeals taxing an appellant $466.52 for 14 copies of appellees' 47-page typeset printed brief unauthorized by Federal Rule of Appellate Procedure 39?

Statement Pursuant to Rule 29.1

There are two corporate respondents in this action, NYNEX Information Solutions Group (now merged into NYNEX Worldwide Services Group, Inc.) and New York Telephone Company. Both NYNEX Worldwide Services Group, Inc. and New York Telephone Company are wholly-owned subsidiaries of NYNEX Corporation. New York Telephone Company has one indirect subsidiary that is not wholly owned directly or indirectly by NYNEX Corporation, Bell Communications Research, Inc. The following are the direct or indirect subsidiaries of NYNEX Worldwide Services Group, Inc. that are not wholly owned directly or indirectly by NYNEX Corporation:

Britannia Cablesystems Bromley
Britannia Cablesystems Darlington
Britannia Cablesystems Solent
Britannia Cablesystems Surrey
Britannia Cablesystems Sussex
Britannia Cablesystems Teeside
Britannia Cablesystems Wessex
Britannia Cablesystems Wirral
Gibraltar NYNEX Communications Ltd.
Lancashire Cable Partnership
NYNEX CableComm Darlington Ltd.
NYNEX CableComm Surrey Ltd.
NYNEX CableComm Wirral Ltd.
NYNEX Meridian Systems
NYNEX Teeside Ltd.
Phone Point
TelecomAsia Corporation Limited

TABLE OF CONTENTS

	PAGE
Statement of the Case	1
Reasons for Denying the Writ	3
I. The Court of Appeals Correctly Determined That It Lacked Jurisdiction Over Petitioner's Appeal	3
II. The Court of Appeals Did Not Violate Petitioner's Rights by Taxing Him $466.52 for Respondents' 47-Page Typeset Brief	4
CONCLUSION	6

PAGE

TABLE OF AUTHORITIES

Cases

Acton Corp. v. *Borden, Inc.*, 670 F.2d 377 (1st Cir. 1982) 3

Coopers & Lybrand v. *Livesay*, 437 U.S. 463 (1978) . 4

CTI-Container Leasing Corp. v. *Uiterwyk Corp.*, 685 F.2d 1284 (11th Cir. 1982) 3

CTS Corp. v. *Piher Int'l Corp.*, 754 F.2d 972 (Fed. Cir. 1984) 5

Harmon Kardon, Inc. v. *Ashley Hi-Fi*, 602 F.2d 21 (1st Cir. 1979) 3

Hines v. *D'Artois*, 531 F.2d 726 (5th Cir. 1976) 3

In re Ramu Corp., 903 F.2d 312 (5th Cir. 1990) 4

Intercontinental Apparel, Inc. v. *Danik, Inc.*, 777 F.2d 775 (D.C. Cir. 1985) 5

Martin v. *United States*, 931 F.2d 453 (7th Cir. 1991) . . 5

McKnight v. *Blanchard*, 667 F.2d 477 (5th Cir. 1982) 4

Moses H. Cone Memorial Hosp. v. *Mercury Constr. Corp.*, 460 U.S. 1 (1983) 3

Peterson v. *Nadler*, 452 F.2d 754 (8th Cir. 1971) 4

Richardson-Merrell, Inc. v. *Koller*, 472 U.S. 424 (1985) 4

Robbins v. *Maggio*, 750 F.2d 405 (5th Cir. 1985) 4

United States v. *General Dynamics Corp.*, 828 F.2d 1356 (9th Cir. 1987) 3

Statute and Rule

28 U.S.C. § 1291 . . . . . 2, 3

Fed. R. App. P. 39 i

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-1689

SCOTT J. RAFFERTY,

Petitioner,

v.

ALBERT HALPRIN, GERALD MURRAY, ROBERT ECKENRODE, GAD SELIG, BARBARA LENT, NYNEX INFORMATION SOLUTIONS GROUP, and NEW YORK TELEPHONE COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

Statement of the Case

Petitioner, an attorney proceeding *pro se*, is a disgruntled ex-employee of a former subsidiary of NYNEX Corporation ("NYNEX"). As part of his self-described role as "an uncompensated, one-man prosecutor of NYNEX Corporation" (A507),[1] petitioner initiated two lawsuits in two

---

1. "A" citations are to the joint appendix in the Court of Appeals and "Pet." citations are to the petition for certiorari.

different federal district courts against NYNEX and its privies (Pet. 8a-14a). In this, the later-filed action, the district court dismissed certain of petitioner's claims and found that his remaining claims were duplicative of claims he had brought or belatedly tried to bring in his earlier-filed action and were therefore *res judicata* (Pet. 14a-22a). Accordingly, it stayed the remaining claims in contemplation of their ultimate dismissal upon the entry of final judgment in the first action (Pet. 22a-23a).

Petitioner appealed to the United States Court of Appeals for the Second Circuit. The Court of Appeals, in a decision not released for publication, dismissed the appeal for lack of jurisdiction, holding that the District Court's order granting the stay was not appealable either as a final order under 28 U.S.C. § 1291 or under the collateral order doctrine (Pet. 1a-2a).

Following the entry of the Court of Appeals' decision, respondents submitted a bill of costs for $466.52 for the 14 required copies of their 47-page typeset printed brief and for $2,310.00 that petitioner had demanded that they advance to him as a condition of including their designations in the appendix.[2] Petitioner objected to this bill of costs, and the Court of Appeals denied his objection (Pet. 3a).

---

2. Petitioner's suggestion that NYNEX's bill of costs for its brief was $2,776.52 (Pet. 8) is thus entirely misleading, as is his statement that the cost per page was "more than $10" (Pet. 22); the actual cost was only 71 cents per page ($466.52 divided by 658 (14 copies of 47 pages)).

Reasons for Denying the Writ

I. The Court of Appeals Correctly Determined That It Lacked Jurisdiction Over Petitioner's Appeal

Petitioner asserts that the Court of Appeals erroneously concluded that it did not have jurisdiction over his appeal because this conclusion allegedly failed to follow this Court's precedents and supposedly conflicts with decisions of four other circuits (Pet. 9-17). Petitioner is incorrect. No case he cites has found a stay to be either a final order appealable under 28 U.S.C. § 1291 or an appealable collateral order in the absence of a threat (not present here) that a party would be denied a hearing in a federal court.

Petitioner first claims (Pet. 11-14) that the District Court's stay is a final order under *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 8-10 (1983). However, as the Court of Appeals correctly noted (Pet. 2a), *Moses H. Cone* was founded on issues of federalism not present in this case. *See* 460 U.S. at 9-10. And as petitioner tacitly admits (*see* Pet. 12 & n.7), the only two decisions addressing the appealability of stays of one federal action in favor of a related federal action, *Acton Corp.* v. *Borden, Inc.*, 670 F.2d 377, 379-82 (1st Cir. 1982), and *Harmon Kardon, Inc.* v. *Ashley Hi-Fi*, 602 F.2d 21, 22-23 (1st Cir. 1979), both held such stays to be non-appealable. None of the cases cited by petitioner dealt with a stay in favor of another federal action.[3]

---

3. Three of the cases cited by petitioner involved stays in favor of administrative or arbitral proceedings, not stays in favor of other federal actions. *See United States* v. *General Dynamics Corp.*, 828 F.2d 1356, 1360-62 (9th Cir. 1987) (administrative proceeding); *CTI-Container Leasing Corp.* v. *Uiterwyk Corp.*, 685 F.2d 1284, 1287-88 (11th Cir. 1982) (Iran-United States Claims Tribunal proceeding); *Hines* v. *D'Artois*, 531 F.2d 726, 730-31 (5th Cir. 1976) (administrative proceeding). Three other cases which petitioner claims determined that stays constituted final orders,

Petitioner's claim of a conflict among circuits is thus illusory.

Petitioner's alternative argument — that the District Court's order falls within the collateral order doctrine (Pet. 14-17) — is also incorrect. The Court of Appeals correctly held (Pet. 2a) that petitioner cannot make the three-part showing required by *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 468 (1978), under which "the order must [1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment." *See also, e.g., Richardson-Merrell, Inc.* v. *Koller*, 472 U.S. 424, 430-31 (1985) (collateral order doctrine is a "narrow exception" to be "strictly applied").

II. The Court of Appeals Did Not Violate Petitioner's Rights by Taxing Him $466.52 for Respondents' 47-Page Typeset Brief

Petitioner also tries to portray a $466.52 bill of costs for producing a 47-page printed brief as violative of his rights (Pet. 18-22). This argument is frivolous.

Petitioner first argues that the cost of printing respondents' brief cannot be taxed because the Second Circuit has not adopted a local rule specifying the maximum rate at which printing costs will be taxed (Pet. 18-20). This argument was

---

Robbins v. *Maggio*, 750 F.2d 405, 409-14 (5th Cir. 1985); *McKnight* v. *Blanchard*, 667 F.2d 477, 478-79 (5th Cir. 1982); and *Peterson* v. *Nadler*, 452 F.2d 754, 756-57 (8th Cir. 1971), likewise did not involve stays in favor of other federal lawsuits. One other case petitioner relies upon, *In re Ramu Corp.*, 903 F.2d 312, 314 (5th Cir. 1990), did not involve an appeal at all but rather a mandamus petition.

not made below, and therefore is not properly before this Court. In any event, as the petition itself discloses (Pet. 19), the Second Circuit is only one of a number of circuits that rely upon their clerks to monitor the prevailing levels of printing costs, rather than attempting to freeze those levels in a local rule. Petitioner cites no authority for the proposition that respondents can be deprived of their taxable printing costs because the Second Circuit has followed this commonsense approach.

Petitioner then argues at length that respondents may not be awarded taxable printing costs because they used an in-house computerized typesetting system rather than a traditional linotype facility (Pet. 20-22). This argument is likewise without merit. Respondents' use of in-house computerized typesetting resulted in a substantially more economical charge for printing than traditional linotype typesetting — only $466.52 for 14 copies of a 47-page printed brief — and gave petitioner no fair ground for complaint.[4]

---

4. In fact, the bill of costs here was consistent with the decisions cited at Pet. 21-22. *Martin* v. *United States*, 931 F.2d 453, 455-56 (7th Cir. 1991), *CTS Corp.* v. *Piher Int'l Corp.*, 754 F.2d 972, 973 (Fed. Cir. 1984), and *Intercontinental Apparel, Inc.* v. *Danik, Inc.*, 777 F.2d 775 (D.C. Cir. 1985), all indicate that it is permissible to recover the costs involved in using in-house computer capabilities for typesetting a brief — precisely what was done here — but not to charge for the use of a computer for its word processing capabilities, a charge not made here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: April 27, 1993

Respectfully submitted,

GUY MILLER STRUVE
Counsel of Record
JAMES D. LISS
SETH RICHARD LESSER
DAVIS POLK & WARDWELL
450 Lexington Avenue
New York, New York 10017
(212) 450-4192

Counsel for Respondents Gerald E. Murray, Robert J. Eckenrode, Barbara A. Morris-Lent, NYNEX Information Solutions Group, and New York Telephone Company

STEPHEN L. GOODMAN
HALPRIN, TEMPLE & GOODMAN
1301 K Street, N.W.
Suite 1020 East
Washington, D.C. 20005
(202) 371-9100

Counsel for Respondent Albert Halprin

REID H. WEINGARTEN
STEVEN K. DAVIDSON
STEPTOE & JOHNSON
1300 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 429-3000

Counsel for Respondent Gad Selig